No. 76-1145

in the

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
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MICHAEL R. LEIBOWITZ

Petitioner

-against-

HERBERT J. SIMINS Commissioner of Department of Public Works; and HARRY I. BRONSTEIN City Personnel Director

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provisions Involved 3
Statement of the Case 3
Reasons for Granting the Writ 6
Important Public Interest 6
Non Constitutional Federal Questions 13
Constitutional Questions 13
Grounds Below Lack Fair Basis 14
Conclusion 17
App. A Opinion of Court of Appeals .. 17
App. B Opinion of Appellate Division 18
App. C Opinion of Supreme Court 19
App. D Opinion of Supreme Court 20

CASES CITED

Koscherak v. Schmeller, 415 U.S. 943 .. 4
Urie v. Thompson, 337 U.S. 163 5
Gottlieb v. Beame, N.Y.L.J. 2/18/64 ... 8
Expert Electric v. Goldin, 51 AD 2d 763 9
Mansfield v. Lindsay, 41 A D 2d 925....10
Dewey v. Des Moines, 173 U.S. 193 14
Uvegas v. Comm. of Penn. 335 U.S. 437 14
Raley v. State of Ohio, 360 U.S. 423 . 14
Ward v. Bd. of Cty. Comm.,253 U.S. 17 14
Suffolk v. Wurlitzer, 24 A D 2d 893 .. 15
Soffair v. Koffler, 29 A D 2d 659 15
Schwab v. McElligott, 282 N.Y. 182 ... 15
Smith v. Stewart, 45 A D 2d 853 16
Cornwell v. Safeco, 42 A D 2d 127 16
Ramos v. Dept. of Mental Hygiene
34 A D 2d 925 16
Rosenberg v. Wickham, 36 A D 2d 881 .. 16

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OR THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, MICHAEL R. LEIBOWITZ, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of New York rendered in these proceedings on November 23, 1976 in which it dismissed my appeal, or to review the opinion and judgment of the Appellate Division of the Supreme Court of the State of New York entered on June 15, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, dismissing our appeal on a motinn to renew, is not yet reported, but appears at Appendix A pp. 17-18. The opinion of the Appellate Division affirming the Judgment of the Supreme Court Special Term is reported in Banow v. Simins 53 App. Div. 2nd 542, and is given in Appendix B pp. 18-19. The opinion of the Special Term is unreported and appears at Appendix C, pp. 19-20

In the original action, the appeals courts gave no opinions. The Special Term opinion was not reported and is given in Appendix D, p. 20.

JURISDICTION

The order of the Court of Appeals of the State of New York was rendered and entered on November 23, 1976. This petition is filed less than ninety days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

I. If the respondents passed us over for promotion and took us off the list because, as we allege, "we would not bend the rules for contractors, especially for one contractor for whom the rules are uncommonly bent," would that be invidious discrimination repugnant to the Fourteenth Amendment?

2. Acknowledging that we have no right to promotion, have we the right under the equal protection provision of the Fourteenth Amendment to be fairly considered for promotion?

3. If under local law a trial will be ordered if the respondents give a reason for our pass-over, is it inconsistent with the equal protection provision of the Fourtheenth Amendment to deny us a trial when we give the reason?

4. Was it repugnant to the due process provisions of Amendments V, and XIV that we were passed over for promotion and removed from the list without getting any

notice whatsoever about what had been done to us?

5. Was it proper for the lower court to grant the respondents' cross-motion to dismiss before answer when by making such motion the respondents were admiting as true all our allegations about their unlawful conduct?

6. Were the local law decisions of the courts below without fair and substantial support so that this court can assume jurisdiction?

7. Are the points in questions 1, 2, and 3 above relevant to the due process provision of Amendment XIV as well as to the equal protection provision?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Constitution, Amendment XIV, Sect. 1 (pp.3-4) "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arose when on November 5, 1973, Robert Banow (who passed away on February 1, 1977) and myself were passed over and removed from a promotion list to Senior Electrical Engineer in the New York City Dept. of Public Works.

At the outset, realize that this case is wholly unlike previous civil service promotion cases where those candidates passed over claimed loss of rights be-

cause the appointing authority would give them no reason. (e.g. Koscherak v. Schmeller, 415 U.S. 943)

Here we say that we know what the reason was, that it was illegal, unconstitutional, and invidious; we say we were passed over because we would not bend the rules for contractors, especially for one contractor for whom the rules are uncommonly bent. (Affidavit in Motion to Renew Aug. 21, 1975, pp 2, 3-4) We have not yet asked any court to accept this allegation per se, but rather to order a trial of the issues where we might prove it.

The whole thing was done subrosa with indications that a planned attempt was made to keep us ignorant of what had happened. (There is a four month statute in a matter like this.) The respondents were guilty of many other acts of bad faith as can be found in the record. We found out by chance, and sought a trial of the issues within a proceeding under Art. 78 of the Civil Practice Law and Rules. (A sort of local version of the All Writs Act.) If we could get an adjudication that the pass-over was arbitrary and capricious then we might seek relief in various ways under local law.

In our original action we raised the constitutional question that our being passed over and removed from the list subrosa without notice was a violation of due process.(Petition of Jan. 7, 1974 pp. 2-3) The Supreme Court denied our petition(Appendix D) and the Appellate Division affirmed without opinion, (Matter of Banow v. Simins 46 App. Div.2d 844). Before the Appellate Division we had

raised the point orally and in our brief that a trial of the issues will be ordered if the respondents give a reason, and so we should have a trial on our given reason that we were victimized because of biases against us unrelated to our abilities, (brief of Sept. 9, 1974, pp. 5, 19-23) In our reply brief of the same action (p. 2) we raised the point that we had the right to be fairly considered for promotion even if we had no right to promotion.

Our motion for leave to appeal to the Court of Appeals was denied without opinion. (Banow v. Simins 36 N.Y.2d 645)

On August 21, 1975 we sought to renew our petition upon newly discovered evidence, namely that when we were passed over, our department had a line available to which one of us might have been promoted, but the line was transferred to another department to avoid promoting us, and to remove us from the list. By local law when someone is passed over three times this removes him from the list. When the other department used this line it gave the respondents the third pass-over to remove us from the list. The constitutional questions raised in the first action were not reasserted in the second, but this Court has held that those questions are still before it, (Urie v. Thompson 337 U.S. 163)

In our motion to renew we alleged that we were victimized because we would not bend the rules for contractors, especially one contractor for whom the rules are uncommonly bent, (Affidavit of Aug. 21, 1975, pp. 2, 3-4). The respondents

cross moved to dismiss our motion before answer and were successful. The Appellate Division affirmed, (Banow v. Simins 53 App. Div.2d 542). Thereafter, we appealed to the Court of Appeals as a matter of right on constitutional questions. The Court of Appeals granted the respondents' motion to dismiss our appeal by equating our motion to renew on new evidence with a motion to reargue. (Appendix A. pp.17-18)

REASONS FOR GRANTING CERTIORARI

I. THIS CASE HAS IMPORTANT PUBLIC INTEREST BECAUSE IT INVOLVES THE MALFEASANCE OF THE CITY'S CONSTRUCTION PROGRAM WHICH HAS BEEN A MAJOR CAUSE OF THE CITY'S FINANCIAL PLIGHT WHICH ALL AMERICAN TAXPAYERS MUST NOW UNDERWRITE.

Congress has appropriated money for New York City for more public construction, a construction which is made a monopoly for favored unions and the contractors associated with them. The favored unions are those comprising the Building Construction Trades Council. The union of this group that I deal mostly with is Local 3 Of the International Brotherhood of Electrical workers, AFL-CIO. This union has two scales, the 'M' scale which is used generally in private work, and the 'A' scale which is used in all public construction. The 'A' scale is twice that of the 'M' scale.

It will be shown that the city's public construction is generated for the sake of this favored group, and that this construction has not only leeched

New York City but has made a potent contribution to national inflation. Before the fiscal crisis the city would spend typically $1.1 billion/year on construction. Typically: the revenue from the 8% sales tax would yield $525 million; the city income tax, $440 million; parking violations bureau, $43 million. Thus the taxpayer has paid a heavy bill for city construction without even considering inflation, for the three tax burdens above pay for about 90% of city construction.

The city, in its recent history, has gone on a construction binge that, even allowing for inflation between the eighteen seventies and the present, has outdone the extravagance of Boss Tweed! In addition to the tearing down and rebuilding of firehouses, police stations, schools, libraries, hospitals, &c, the city has been so kind as to do the building for private organizations. The city fathers are great lovers of baseball for they have rebuilt the Yankee Stadium; they are great lovers of music, for they have built a new college for the Julliard School; ditto Pace College; ditto the so called "Fashion Institute of Technology"on 7th Avenue, &c.

The most imaginative application of the city's program of rebuilding was probably in the construction of the new Bellevue and Gouverneur Hospitals. These hospitals were actually rebuilt a few times while they were being constructed in order to gain more federal assistance The final cost came to perhaps six times the original estimate.

Some think that construction is "pump priming" for the local economy. However, actual "pump priming" occurs only with federal money, since the federal government generates the money supply. When the lion's share is paid from the city's capital budget, Peter is just being robbed to pay Paul. Paul, too often, is an out-of-towner. The city is now getting federal money to build new libraries, firehouses, &c before it opens its closed ones. Now at least it could be called "pump priming." The bill, however, is being footed by more responsible communities paying through federal taxation so that New York City may again glut its construction cabal.

Recently, The New York Times (Dec. 2, 1976 p. 1) told the story of a builder's campaign contributions made in the expectation of city construction contracts. That builder Christopher Boomis had gotten a $37 million dollar contract, without competitive bidding, to build a pier and warehouse in the Bronx.

Before 1964, all city public work was the blatant monopoly of the favored unions and associated contractors. This monopoly was enforced by requiring contractors on public work to contribute funds for supplemental benefits to the favored unions only. Only those contractors having contracts with the favored unions could comply. This was finally stopped with the decision of Gottlieb v. Beame, N.Y.L.J. Feb. 18, 1964, New York County Special Term Part I. At that point the city developed new devices to reserve its work for the favored.

In every city construction contract the required wage for every trade is spelled out. These wages are pegged to the scales of the favored unions. The claimed justification for this is Sect. 220.5(a) of the State Labor Law, whichis a local version of the federal Davis Bacon Act. To justify a wage for public work under this local law, it would be necessary for the comptroller to show that 40% of the workers doing that type of work locally were being paid that wage, and workers getting that wage under this law cannot be figured in the reckoning. The comptroller has never been able to do this. However, the city makes the payment of favored union rates a condition precedent on all its public work contracts. Bear in mind that the 'A' rate for public work is double the 'M' rate for private work.

When a non-favored contractor successfully bids a city job by agreeing to pay the union rate, I have seen him get all manner of harassment from the comptrollers office e.g. checking minority hiring, continuous audits of his books &c. In one case at law Expert Electric v. Goldin 51 App. Div.2d 763; the court noted that the comptroller's actions could destroy the contractor.

Much as the State Labor Law is tortured in its application against the non-favored it is ignored for the favored. For example Sect. 220.1 says that eight hours shall be the work day on public work. Yet until July 1976 local 3 was getting time and an half after the fifth hour. Now they are getting time and an half after the seventh hour.

If a non-union contractor confines his ambition to $5000- jobs and pays the union scale, he will be left alone; but if he gets too big for his britches, he will be taken care of. Take the case of Mansfield Contracting Corp. v. Lindsay, 41 App. Div.2d 925. Mansfield was attempting to do city work without the favored union, had, had difficulties with the comptroller's office but stuck with it. Even though he payed the local 3 rate he was able to underbid the local 3 contractors significantly because his men would work harder to merit employment at the higher rate of local 3. He was the low bidder for a $4.2 million job on Rikers Island. On January 11, 1973, the Board of Estimate voted unanimously to cancel Mansfield's contract on the grounds that his union was racket connected. Mansfield could not obtain the relief he sought in the local court, but was successful in federal court for the Southern district of New York, as was reported in the N.Y.L.J. May 4, 1973 p. 5 col. 5, and quoted here:

> U.S. JUDGE ORDERS CITY TO HALT BIAS AGAINST COMPANY."
>
> "Mayor Lindsay, members of the Board of Estimate and others were accused yesterday in Federal Court of discriminating against a Queens electrical contracting concern because of its alleged underworld connections.
>
> "Judge Whitman Knapp directed that the city halt its unlawful bias against the Mansfield Contracting Corp. of Flushing, which complained that the city's allegations were 'false

> and utterly baseless.'
>
> " * * * The evidence submitted to a hearing, Judge Knapp said in his ruling in the U.S. District Court for the Southern District of New York, suggested that the Mayor, the Board of Estimate, and three employer associations 'have committed and will continue to commit the acts set forth..'
>
> "In his complaint, company president Richard M. Muffoleto of Great Neck, L.I. alleged a 'conspiracy' among the Mayor and other city officials with the International Brotherhood of Electrical Workers 'to monopolize city construction work.'"
>
> (Index. 73 Civ. 1094)

And so Mansfield won the right to operate outside of Local 3. But Mansfield was eliminated as a maverick by the city's paying him $800,000- in claim settlement contingent upon his joining Local 3; to this was added a promise from Local 3 of $6 million of business from bonding companies on defaulted contracts.

The lengths the city went to maintain the monopoly of Local 3 were impressive. I checked the officially listed campaign contributions in our last Mayoralty election, and Local 3 had contributed $3000- to Mr. Beame- a microscopic amount considering. It might be noted that the respondent Simins was Public Works Comm. of Nassau County before being named Public Works Commissioner of New York City by Lindsay and retained by Beame. In October of 1975, the respondent Simins had testified before a grand jury of the Eastern

District of New York looking into alleged illegal campaign contributions he may have received from contractors when he was public works commissioner in Nassau County. He refused to say whether he had waived his rights to immunity.

The city's construction program is inflationary for the whole country when it operates as a pork barrel for the favored. In order to maintain the monopolies of the favored unions the city must force those unions' wage scales on all its public construction. This will have an effect of making those wages spuriously high, since the employers won't care how high those wages are when the city is guaranteed to underwrite them. Indeed, if all bidders must pay the same wages, the higher the wages, the greater the profit on "time and materials" ("cost plus") jobs. It is no wonder the 'A' rate is twice the 'M' rate. Knowledge of the 'A' rate on city work has a powerful psychological force on all workers at bargaining time.

Since the time of Boss Tweed, construction has been the favorite device for transferring the taxes of the many to the coffers of the few. Dollarwise, construction is the greatest source of malfeasance on the local level. So intimately linked is public construction and government malfeasance that if one attempts to file newspaper clippings on the subjects they cannot be separated into different files.

Where the city has set up a construction program that is pro-organized labor, but anti-work, that is pro-spending, but anti-worth, that has burdened its citiz-

ens with heavy taxation, that has contributed to the city's fiscal collapse, and that has contributed to the national inflation; the courts should not protect from scrutiny those city officials whose actions may have been unlawful.

Accordingly certiorari is asked on grounds of compelling public interest.

THERE ARE FEDERAL QUESTIONS HERE IN ADDITION TO THE CONSTITUTIONAL ONES

Here two licensed professional engineers have alleged in affidavit that they were passed over on promotion and removed from the list because they wouldn't bend the rules for contractors, especially for one contractor for whom the rules are uncommonly bent. This should raise the question of whether the city's construction program is a pork barrel for the privileged, which as we have seen is a major, though unadvertised, cause of the city's financial plight. Previously, this construction was partly funded with federal money. Presently, all new public construction will be funded federally. Some of the laws involved have been; The Employment Act of 1946 15 USC 1022; and the Comprehensive Employment and Training Act of 1973.† Since city construction has been and is a product of federal law, any malfeasance in the program becomes a federal question. † 42 USC 6701

CONSTITUTIONAL QUESTIONS GIVE THIS COURT JURISDICTION

In our original petition we claimed loss of rights repugnant to due process

of law (pp.4-5 supra) relative to being passed over and removed from a list without notice.

Additionally, our allegation on the reason for the pass-over makes a question of invidious discrimination repugnant to the equal treatment provision of Amendment XIV without being directly labeled so. This Court has held that constitutional questions can have been presented without specific labeling, e,g. Dewey v. City of Des Moines, 173 U.S. 193, 199-201; Uvegas v. Commonwealth of Pennsylvania, 335 U.S. 437; and this is especially the case in questions of public importance, e.g. Raley v. State of Ohio, 360 U.S. 423.

The above applies also to the question we raised below (p. 5 supra) about how the local courts will order a trial of the issues if the respondents offer a reason for the pass-over, but not if we offer the reason.

THE NONFEDERAL GROUNDS RELIED ON BY THE COURTS BELOW ARE WITHOUT FAIR AND SUBSTANTIAL BASIS.

The courts below, in denying us relief, always used reasons that avoided our allegation. This Court has held that its jurisdiction is not defeated if the non-federal ground relied on below is without any fair and substantial basis,(Ward v. Board of County Commissioners, 253 U.S. 17,22.)

In the Court of Appeals we had appealed as a matter of right because of constitutional questions. The court dismissed our appeal on the city's motion. In doing so (Appendix A p.17) the court equated a motion to renew on new evidence with a motion to reargue. Now a motion to renew and a motion to reargue are made distinct by statute (New York State Civil Practice Law and Rules Section 2221 and 5015(a)(2))and case law where a motion to renew has been held to be appealable,(Suffolk v. Wurlitzer, 24 App. Div.2d 893,894; Soffair v. Koffler, 29 App. Div.2d 659, 660, app. dis. 23N.Y.2d 897) I feel the court tortured the law in dismissing our appeal.

In the Supreme Court our motion to renew was defeated by the respondents' cross motion to dismiss before answer on the ground of res judicata. It should be obvious that this was error to apply res judicata to new matter, and the Appellate Division agreed with us (Appendix B) but denied us relief on new grounds.

The lower court decision was interesting in another respect By moving to dismiss before answer, the respondents effectively admitted as true all of our allegations,(McKinney's C.P.L.R. 3211 - C3211:24) Therefore, in order to move to dismiss before answer, the respondents put themselves into the paradoxical position of admitting as true,acts that are blatantly unlawful and unconstitutional. No court should allow them to succeed with such a position. See Schwab v. McElligott, 282 N.Y. 182, 186. But here they did.

The Appellate Division in affirming the Supreme Court allowed that the res

judicata argument could not hold, but they accepted new arguments the respondents had not used below which is contrary to local law (Smith v. Stewart 45 App. Div.2d 853,854) The arguments themselves "just don't wash" as Justice Holmes used to say. The court said (Appendix B p.19) that we didn't show that with due diligence we could not have produced the evidence at the time of the original petition. Now leaving aside all questions about our being faulted for not knowing secrets that were kept from us, in logic it is impossible to prove a negative argument. A man can no more show that he could not have done the above, than he can show that the Loch Ness monster does not exist. It was for the respondents to demonstrate that we had opportunity to find out earlier,(Cornwell v. Safeco Ins. Co., 42 App. Div2d 127, 134-135).

It was also said that we did not demonstrate that the new evidence would have rendered a different result. But we gave them cases where petitioners had gotten trials of the issues with far less supporting evidence of the respondents bad faith than we had shown. e.g. Ramos v. Dept. of Mental Hygiene,34 App. Div.2d 925. The Ramos case involved a provisional who was being discharged after his probationary period; whereas our case involves a pass-over and removal from a list; however, our local courts have always found these two situations to be identical at law e.g. Rosenberg v. Wickham, 36 App. Div.2d 881,882

I respectfully submit that the local courts went against statute, against precedent, and against logic in stopping us from getting a trial of the issues.

CONCLUSION

For reasons of important public interest,federal questions other than constitutional, constitutional questions, and because the local law decisions are without fair and substantial support, a writ of certiorari should issue to review the Court of Appeals decision in dismissing the appeal, or to review the decision of the Appellate Division.

Respectfully submitted,

Michael R. Leibowitz

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Pro Se

February 17, 1977

APPENDIX A

Opinion of Court of Appeals

At a session of the Court, held at Court of Appeals Hall in theCity of Albany on the twenty third day of November A.D.1976

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge Presiding.

Mo. No. 1077 In the Matter of
Robert Banow*and Michael R. Leibowitz
Appellants,

-against-

Herbert J. Simins, Commissioner of Dept. of Public Works, & ano., &c., Respondents, for a judgment &c.

A motion having heretofore been made herein upon the part of therespondents to dis-

*Robert Banow passed away on Feb. 1, 1977

miss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is ORDERED, that the said motion be and the same hereby is granted and the appeal is dismissed without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution (see Marsano v. State Bank of Albany, 39 NY 2d 900)

Joseph W. Bellacosa
Clerk of the Court

APPENDIX B

Opinion of Appellate Division

Stevens, P.J., Markewich, Capozzoli, Nunez
Lynch, JJ. 2581 First Department

In re Robert Banow, et ano.,
Petitioners-Appellants,
M.R. Leibowitz

-against-

Herbert J. Simins etc. et ano.,
Respondents-Respondents,
D.R. Eisner

For a Judgment under CPLR Article 78.

Order, Supreme Court, Bronx County (Brust , J.), entered December 18, 1975 granting respondents' cross motion to dismiss appellants' motion to renew, unanimously affirmed without costs and without disbursements. Appellants are employees of the Bureau of Building Design of the New York City Department of Public Works. They

commenced an Article 78 proceeding claiming they were improperly "passed over" for promotion. A denial of their petition was affirmed by this Court (Matter of Banow v. Simins, 46 A D 2d 844), and their motion for leave to appeal was denied by the Court of Appeals (36 N Y 2d 645). Appellants thereafter brought the instant motion to renew on the basis of newly discovered evidence, to wit the transfer by their department to another department of a budgetary position to which one of them might have been promoted. While in certain circumstances, it might be proper for the court of original jurisdiction to entertain a motion to renew based on newly discovered evidence after the appellate courts have affirmed the original order (see Sheridan v. Andrew, 80 N.Y. 648 (1880); Henry v. Allen, 147 N.Y. 346 (1895); Kirkpatrick Home for Childless Women v. Kenyon, 209 App. Div. 179, 181 (1924)), appellants herein have not demonstrated that the newly discovered evidence would have rendered a different result. Nor have appellants shown that with due diligence they could not have produced the evidence at the time of the original petition. June 15, 1976

APPENDIX C

Opinion of Supreme Court

SUPREME COURT BRONX COUNTY

Robert Banow and Michael R. Leibowitz
Petitioners

-against-

Index No. 6108/74

Herbert J. Simins Commissioner of Dept. of Public Works, and Harry I Bronstein City Personnel Director. Respondents.
for a judgment under Art. 78 CPLR

This is a motion by the petitioner to renew petition for judgment under Article 78 of the CPLR..The record indicates that the court's original decision was unanimously affirmed in the Appellate Division on November 14, 1974. Motion for leave to appeal to the Court of Appeals was denied on May 7, 1975. Accordingly, petitioner's motion is denied, and the respondent's cross motion to dismiss the petition is granted

Dated Dec. 9, 1975 Joseph A. Brust
J.S.C.

APPENDIX D

Opinion of Supreme Court in First Action

Same citation as Appendix C

This application by petitioners for relief pursuant to Article 78 CPLR to compel the appointment to a promotional position in the Civil Service of this city is denied.

The petitioners were qualified for appointments to the sought positions but were passed over when appointments were made of one of first three persons certified to be elegible on the list of candidates for the position. Traditionally, the right to make appointments in this manner has been proper exercise of the discretionary power to make appointments (people ex. rel. Balcom v. Mosher, 163 N.Y. 32). The respondent has the right to make selection in this manner and need not furnish any reason for passing over petitioners (Matter of Delicati v. Schechter

The petition is dismissed. Settle judgment.

May 22, 1974 Jos. A. Brust
J.S.C.